Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
The Effect of Foreign Mobile Termination Rates	)	
on U.S. Customers	)	IB Docket No. 04-398
	)	
	)	
	)	

COMMENTS

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Dated: January 14, 2005

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EXECUTIVE SUMMARY

NII Holdings, Inc. ("NII Holdings") is a mobile service provider based in Virginia with operations in Argentina, Brazil, Chile, Mexico and Peru. Unlike many other mobile service providers, NII Holdings is a strong advocate for decreasing mobile termination rates. NII Holdings recognizes that such rates are not cost-oriented, harm U.S. consumers and work to the detriment of small mobile operators. This situation is particularly true in Peru where one mobile operator controls 74% of the market and the wholesale mobile termination rate is one of the highest rates in the world.

Although Telefónica, the dominant operator in Peru, has a wholesale termination rate as high as US$0.25 per minute, it is able to offer its mobile end-users a rate of US$0.03 per minute for on-net calls. Given this differential, Telefónica's wholesale termination rate is significantly above-cost and appears to be subsidizing its end-user rates. NII Holdings is paying significantly above-cost termination rates to Telefónica. These rates, coincidentally, are also the highest rates that Telefónica charges in any of the countries in which it operates.

As the Federal Communications Commission (the "Commission") noted in its Notice of Inquiry, several regulatory authorities have taken actions to decrease mobile termination rates. In Peru, the regulator has been looking at the issue of mobile termination rates since 2000 but no significant actions have been implemented by the regulator for wholesale mobile termination rates. Therefore, we are strongly encouraged by the Commission's initiative to review the issue of mobile termination rates and potentially encourage regulators to decrease their above-cost rates. These types of measures are essential to ensuring a competitive marketplace and protecting U.S. consumers.

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COMMENTS

NII Holdings, Inc. ("NII Holdings") hereby submits its comments in response to the Notice of Inquiry on foreign mobile termination rates (the "NOI") released by the Federal Communications Commission (the "Commission") in the above-captioned proceeding. NII Holdings, Inc. is a mobile communications services provider based in Virginia with operations in Argentina, Brazil, Chile, Mexico, and Peru.

NII Holdings brings a different perspective to this proceeding. Unlike other mobile providers, it strongly advocates significant decreases in mobile termination rates. As a small mobile operator in Latin America, NII Holdings and its subsidiaries are forced to make significant out-payments in termination rates to other mobile carriers. The situation is particularly egregious in Peru where NII Holdings' subsidiary, Nextel del Perú, S.A. ("Nextel Peru") is faced with mobile termination rates that are among the highest in the world and the highest in Latin America.

I. IMPACT OF CPP REGIMES

In most jurisdictions in which NII Holdings' subsidiaries operate, including Peru, mobile services operate through a Calling Party Pays ("CPP") regime.[1] Under this system, the mobile network operator collects charges for terminating a call on its network, *i.e.*, the mobile termination rate, from the caller's network operator. Generally, this charge is passed on to the calling party, but in other instances, such as with NII Holdings, the calling party's provider assumes most or all of that charge. In Peru, NII Holdings is not able to simply pass-through the mobile termination charge to its subscribers because the competing mobile operator charges its subscribers an on-net retail rate that is lower than its wholesale retail (see discussion below in Section III). Thus, NII Holdings would be forced to exit the mobile services market if it charged its subscribers such rates.

According to the Working Party on Telecommunications and Information Services Policies of the Organization for Economic Co-operation and Development (OECD), "[a]n important reason for above cost termination is that, where a calling party pays system exists, mobile operators have market power in the termination of a call. The customer placing a call has no choice if they want to complete the call but to terminate the call on the network chosen by the mobile subscriber they are calling."[2] The result is the terminating mobile operator has the ability – and a strong incentive – to charge termination rates that significantly exceed the costs of terminating the call. Why? The

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[1] In Peru, CPP was introduced for mobile services on February 26, 1996 with the issuance of Resolution No. 005-96-CD/OSIPTEL. Although mobile service operators are permitted to offer CPP and non-CPP (*i.e.*, receiving party pays) plans, the mobile market is predominantly under a CPP regime, and in the case of Nextel Peru, 100% of its subscribers are under CPP plans.

[2] *See International Refile of Mobile Traffic (Tromboning),* Organization for Economic Co-operation and Development, at 3, DSTI/ICCP/TISP (2000) 11/FINAL (Jun. 26, 2001).

reason is simple – these high rates generate a significant amount of revenues for terminating mobile operators and allow them to subsidize retail products and services to maintain, and expand, their subscriber base. As noted by the International Telecommunications Users Group ("INTUG") in its submission to the Commission, "[i]t reflects the search by cellular operators for a source of revenues to offset the substantial discounting in domestic call origination, the subsidization of handset prices and the pressure they face from financial markets to increase their Average Revenue Per User (ARPU)."[3]

It is estimated that, on average, mobile termination rates comprise 25% of overall revenues for most mobile operators with CPP systems.[4] However, this percentage is considerably higher in Peru. According to a study conducted by the Peruvian regulator, Organismo Supervisor de la Inversión Privada de Telecomunicaciones ("OSIPTEL"), 71.5% of Peru's mobile service operators' revenues are attributed to termination of traffic.[5] With such a profitable regime, Peruvian mobile operators with a significant market share have no motivation to reduce their mobile termination rates without regulatory intervention.

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[3] *The high cost of calls to foreign cellphones,* INTUG (Apr. 8, 2002), *available at* http://www.intug.net. (Submission by INTUG to Mr. Donald Abelson, International Bureau, Federal Communications Commission).

[4] Jan Dawson, *Mobile termination rates: Do you have a Plan B?,* Industry Viewpoint *in* Total Telecom, Jan. 31, 2003. (Article contribution by Jan Dawson, an analyst at Ovum).

[5] *See* OSIPTEL, *Documento de Trabajo – Relación de las Llamadas Locales Fijo-Moviles* [*Working Study – Relations of Local Fixed-Mobile Calls*], Jan. 2004, at 11 [hereinafter *OSIPTEL Study on Fixed-to-Mobile Calls*].

II. MOBILE TERMINATION RATES IN PERU

As of September 30, 2004, Peru had nearly twice as many mobile lines in services as fixed lines.[6] The mobile marketplace in Peru encompasses three players: Telefónica Móviles S.A.C. (Telefónica Móviles España S.A. and Telefónica Móviles S.A.C. are collectively referred to as "Telefónica")[7] (74% market share);[8] TIM Perú, S.A.C. ("TIM") (21.4% market share) and Nextel Peru (5% market share). Thus, in Peru, the majority of calls originated on Nextel Peru's network destined to other mobile networks are terminated on the Telefónica network, subjecting Nextel Peru and its customers to significant above-cost mobile termination rates.

The regulatory regime in Peru requires uniform, cost-oriented rates. Pursuant to OSIPTEL's Interconnection Regulations (set forth in Resolution 001-98-CD): (a) local operators must offer the same service on the same terms; (b) interconnection charges should comprise (i) the costs of interconnection, (ii) the cost contribution of the local service provider, and (iii) a reasonable mark-up; and (c) mobile termination rates should be equal to direct costs. In addition, OSIPTEL has issued Telecommunications Market Opening Policy Guidelines for Peru (the "Guidelines") that mandate a single termination rate for local, long distance, and international calls to avoid distorting the market and

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[6] Based on statistics on the Peruvian regulator's website, there were 1,990,513 fixed lines in service, providing a fixed penetration rate of 7.2 and there were 3,769,608 mobile lines in service, providing a mobile penetration rate of 13.63. *See* http://www.osiptel.gob.pe/Index.ASP?T=P&P=2636.

[7] Telefónica Móviles S.A.C. is the mobile services subsidiary in Peru of Telefónica Móviles España S.A.

[8] This includes Telefónica's ownership in BellSouth Peru. Telefónica completed the acquisition of Bellsouth's mobile operations in all 10 jurisdictions (Argentina, Chile, Colombia, Ecuador, Guatemala, Nicaragua, Panama, Peru, Venezuela and Uruguay) on January 11, 2004. As a result of the merger, Telefónica became the largest mobile operator in Latin America and the second largest mobile operator in the world, with over 50.6 million subscribers. *See* Cristina Molina, *TEM acquires last BellSouth unit – Argentina* – Business News Americas, Jan. 11, 2004.

creating opportunities for arbitrage.[9] Despite the Regulations and Guidelines, OSIPTEL has failed to implement cost-based termination rates. This not only runs contrary to Peru's regulatory regime, but also violates Peru's commitments under the WTO, specifically Section 2.2 of the WTO Reference Paper, which requires that interconnection with a major supplier must be provided on terms, conditions and cost-oriented rates that are non-discriminatory, "transparent and reasonable, having regard to economic feasibility...."[10]

In 2001, OSIPTEL capped the mobile termination rate at US$0.2053 per minute for domestic and international long distance and local payphone calls terminating on mobile networks.[11] At that time, OSIPTEL failed to impose any type of cap on mobile-to-mobile termination rates. As a result, rates for mobile-to-mobile calls are negotiated between the carriers. Today, a range of rates exists for mobile-to-mobile calls from US$0.2053 to US$0.25.[12]

In a report issued in January 2004, OSIPTEL concluded that based on an international comparison of mobile termination rates, the rates in Peru were significantly higher than the rates in the European Union – which ranged between 10 cents euro (11.5 cents US) per minute in Sweden to 21 cents (24 cents US) in Portugal, whereas the rate in

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[9] Supreme Decree No. 020-98-MTC, *Lineamientos de Politicas de Apertura del Mercado de Telecomunicaciones en Peru* [*Telecommunications Market Opening Policy Guidelines for Peru*], Aug. 4, 1998, at ¶ 48.

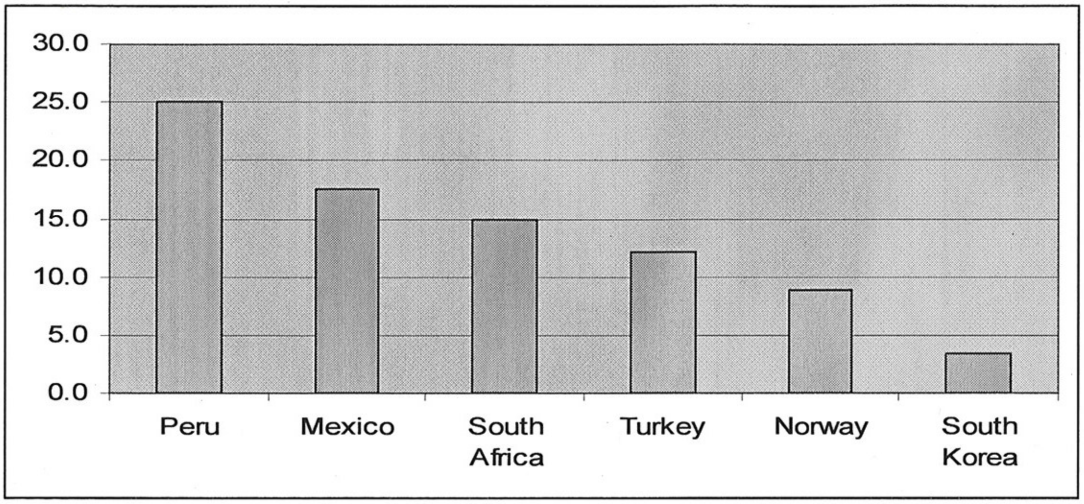
[10] WTO, Fourth Protocol of the GATS, "Telecommunications Services: Reference Paper", at § 2.2 (Apr. 2, 1996), *available at* http://www.wto.org/english/news_e/pres97_e/refpap-e.htm.

[11] *See* Resolution No. 004-2001-CD/OSIPTEL and Resolution No. 042-2001-CD/OSIPTEL.

[12] *See* OSIPTEL No. 031-GPR/2004, *Inicio del procedimiento de oficio para la fijación del cargo o cargos de interconexión tope por terminación de llamadas en las redes de servicios móviles* [*Administrative proceeding to establish capped interconnection charges to terminate calls on mobile networks*], Jun. 21, 2003.

Peru was nearly 21.5 cents euro (25 cents US).[13] The report also noted that the rates were much higher than the average mobile termination rate in the region. Today, the situation is much worse since many countries in Europe and in other regions have decreased their wholesale mobile termination rates.

Chart 1: Global Comparison of Mobile Termination Rates, 2004, US¢[14]



In January 2005, OSIPTEL issued a press notice that it would decrease fixed-to-mobile termination *retail* rates for users by 9% at the end of January 2005 and would introduce an additional 19% reduction of such rates in July 2005.[15]

To date, however, no mandatory reduction in wholesale termination rates has been imposed by OSIPTEL. Recently, the regulator initiated a mobile termination rate proceeding. Mobile operators have until February 15 to provide OSIPTEL cost model

[13] *See OSIPTEL Study on Fixed-to-Mobile Calls, supra* note 5, at 16.

[14] Data for South Africa refers to fixed-to-mobile rates and are the average of peak and off-peak rates. 2004 data was converted to US$ by 2003 annual average exchange rates. If different rates prevail among mobile operators, those for the largest (by subscriber market share) are used. Compiled from data available on national regulatory authority websites.

[15] *A Fines De Enero Empresas Moviles Deben Reducir Precios De Llamadas De Fijo Movil* [*At the End of January Mobile Companies Should Reduce Prices for Fixed-Mobile Calls*], Press Note, OSIPTEL, Jan. 6, 2005 (emphasis added).

information for their mobile termination rates.[16] Based on this information, OSIPTEL will decide the amount of the wholesale mobile termination rate, as well as its application.[17] While this announcement demonstrates a step in the right direction, it should also be considered that OSIPTEL has been looking at this issue since 2000 and has yet to establish a cost-based uniform wholesale termination rate. Instead, it has adopted a piecemeal approach that implements caps on certain termination rates and not others.

Furthermore, OSIPTEL is considering adoption of a provisional wholesale mobile-to-mobile termination rate at US$0.2053 that would expand the application of the current cap of US$0.2053 for domestic and international long distance and local payphone calls terminating on mobile networks to mobile-to-mobile calls. This provisional rate is being introduced by OSIPTEL to address the above-cost termination rates until a fully documented cost model can be developed and verified.[18] NII Holdings is concerned that OSIPTEL will implement the provisional rate of $0.2053 (which is significantly above-cost) and will not act promptly to implement a cost-based mobile termination rate.

The provisional rate OSIPTEL is proposing is based on a benchmark study conducted in 2000. If the study were updated to reflect current 2004 data (as shown in Table 1 below), it would demonstrate that the average mobile termination rate has

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[16] *Id.*

[17] *Id.*

[18] *Proyecto de Norma que amplía ámbito de aplicación de cargo de terminación de llamada en redes del servicio de telefonía móvil, servicio de comunicaciones personales y servicio troncalizado [Draft Regulation that expands scope of application of the termination rate for calls on the networks of mobile, personal communication services and trunking service]*, Resolution No. 095-20004-CD/OSIPTEL, Dec. 17, 2004.

dropped from US$0.2053 to US$0.1660. Moreover, if the benchmark study were to include a broader group of European countries (*e.g.*, including Cyprus, Czech Republic, Latvia, Lithuania, Norway, Poland, and Slovak Republic) – many of which have rates between 11 and 16 cents – the average mobile termination rate would likely be lower.[19] In fact, when comparing mobile termination rates in Latin America, Peru's mobile termination rate is more than one and half times higher than the regional average.[20]

Table 1: Comparison of 2000 and 2004 Mobile Termination Rates[21]

Country	2000 Ovum MTR Benchmark Rate (US cents)	2004 IRG (US Cents)	Country	2000 Ovum MTR Benchmark Rate (US cents)	2004 IRG (US Cents)
Argentina	34.34	8.00	**Italy**	17.09	19.47
Austria	12.75	15.88	**Mexico**	27.56	17.52
Brazil	10.86	12.39	**The Netherlands**	17.16	20.09
Belgium	19.3	17.50	**New Zealand**	15.79	14.92
Chile	18.2	11.37	**Spain**	20.47	16.62
Denmark	14.55	14.80	**Sweden**	17.03	14.54
Finland	15.89	15.98	**Switzerland**	24.98	27.50
France	31.14	19.01	**United Kingdom**	18.93	14.95
Germany	15.31	18.64	**Venezuela**	44.57	15.88
Ireland	14.18	14.44			
Average MTR				20.53	16.60

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[19] *See* Independent Regulators Group, IRG Snapshot of Mobile Termination Rates (Jan 31, 2004), *available at* http://www.regtp.de/imperia/md/content/internatio/11.pdf [hereinafter *IRG Study*]; *See also* Notice of Inquiry, *In the Matter of the Effect of Foreign Mobile Termination Rates on U.S. Customers,* IB Docket No. 04-398, FCC 04-247, Appendix C, at C-1 (October 26. 2004) [hereinafter *NOI*].

[20] Based on eleven other Latin American countries in which Telefónica Moviles operates. The average mobile termination rate in these countries was US$0.1483 in 2004.

[21] For purposes of preparing this chart we used the same countries that were included in the Ovum benchmark study used by OSIPTEL. Certain of these countries were not included in the IRG benchmark study. For Latin American countries, conversion factor is based on the 2004 annual average exchange rate. *See IRG Study, supra* note 19; *see also NOI, supra* note 19, *Appendix C. See* OSIPTEL, Resolution N°004-2001-CD/OSIPTEL, *Comparación Internacional de Cargos de Interconexión por Terminación de Llamadas en Red Móvil* [*International Comparison of Interconnection Rates for Termination of Calls in Mobile Networks*], February 23, 2001, *citing to* www.ovum.com.

III. DIFFERENTIALS IN ON-NET MOBILE RETAIL PRICES AND WHOLESALE TERMINATION RATES

Telefónica's mobile retail price for on-net calls is more than six times below the lowest wholesale termination rate.[22] Telefónica's market power allows it to engage in margin squeeze tactics by setting on-net end-user rates at US$0.03 per minute and wholesale termination rates to other mobile providers above US$ 0.207. This practice clearly works to the detriment of the smaller competing mobile operators, which have difficulty attracting potential customers.

Consequently, small carriers like Nextel Peru suffer from the imposition of above-cost mobile termination rates because they have no alternative but to terminate a high proportion of their calls on the called party's network. This discrepancy between dominant operator on-net retail prices and wholesale mobile termination rates places smaller competitors like Nextel Peru at a tremendous competitive disadvantage in the Peruvian market.

Dominant operators such as Telefónica are abusing their significant market power to leverage above-cost mobile termination rates against smaller competitors by subsidizing on-net costs with off-net revenues, thereby making their network more attractive to subscribers of other networks and 'locking in' existing customers. This form of margin squeeze by dominant operators, which often occurs in the case of mobile-to-

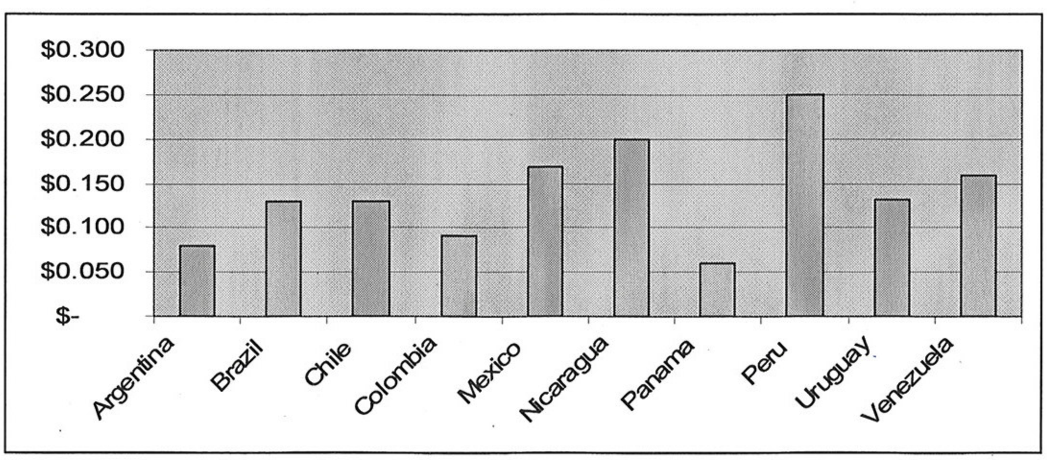
[22] *See* Diario La República, Economy Section, Feb. 4, 2000, at 15 (Telefónica Moviles S.A.C.'s mobile services tariffs outlined as 1200 minutes at US$40.00, which amounts to US$0.03 per minute, effective as of February 4, 2004).

mobile interconnection, "...is likely to result in high off-net and low on-net tariffs on the retail market which puts entrants with a small customer base at a disadvantage."[23]

Peru's mobile termination rates limit competition in its mobile services market. The disparity in the mobile termination rates charged by Peru's various mobile operators, the lack of call termination alternatives for mobile carriers, and the incentive to maintain high mobile termination rates, creates market distortions and promotes anticompetitive practices among the local operators. Such practices reduce competition among mobile providers and severely compromise the development of a long-term competitive mobile market in Peru.

Telefónica's mobile termination rate in Peru reaches as high as US$0.25 per minute. This is the highest mobile termination rate charged by Telefónica in any of the countries in which it operates, including Argentina, Brazil, Colombia, Chile, Ecuador, Mexico, Nicaragua, Panama, Spain, Venezuela, and Uruguay. For example, Telefónica's rate in Peru is US$0.19 cents higher than its mobile termination rate in Panama.

Chart 2: Telefónica's Mobile Termination Rate, US$ per minute, 2004[24]



[23] European Commission, *Consultation Document on draft joint ERG/EC approach on appropriate remedies in the new regulatory framework*, Nov. 21, 2003, ¶ 4.5.3, at 19.

[24] These mobile termination rates refer to mobile termination rates for fixed and mobile origination. When the mobile termination rate is provided in national currency, it is converted to US$ at 2004 annual average exchange rate.

IV. RELATIONSHIP BETWEEN AFFILIATION AND MOBILE TERMINATION RATES

The Commission requests information on whether, and to what degree, affiliations between foreign fixed carriers and mobile network operators affect foreign mobile termination rates. In Peru, Telefónica, has separate subsidiaries that provide fixed (*i.e.,* local and long distance) and mobile services. As a result, Telefónica has 74% of the mobile services market, 99% of the fixed local market, and a significant market share in the fixed international market. This type of market power in all sectors of the Peruvian telecommunications market fosters high mobile termination rates. Although Telefónica, the long distance provider, may recognize that mobile termination rates are significantly above-cost, it is unlikely that it will encourage OSIPTEL to seek any decrease in mobile termination rates since Telefónica's sister company is seeking substantial monetary rewards from these high rates.

V. CONCLUSION

The U.S. Government, through the Office of the United States Trade Representative, the National Telecommunications and Information Administration within the U.S. Department of Commerce, and the Commission, has recognized the anticompetitive effect of above-cost mobile termination rates on the development of international telecommunications markets, and their negative impact on U.S. companies and customers.

Telecommunications regulators, such as OSIPTEL, have initiated certain measures to decrease mobile termination rates. These measures are not sufficient, particularly with respect to Peru where the mobile termination rate is substantially higher than the rates existing in most other countries. As such, NII Holdings strongly advocates that the Commission undertake measures to promote necessary decreases in mobile termination rates.

Respectfully submitted,

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